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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re S.J. et al., Persons Coming Under the Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES AGENCY,

Plaintiff and Respondent,

v.

S.J. et al.,

Defendants and Appellants.

G048618

(Super. Ct. Nos. DP019765 & DP019766)

OPINION

Appeals from an order of the Superior Court of Orange County, Richard Y. Lee, Judge. Affirmed.

Linda J. Vogel, under appointment by the Court of Appeal, for Defendant and Appellant S.J.

Marsha F. Levine, under appointment by the Court of Appeal, for Defendant and Appellant A.H.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Aurelio Torre, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for Minors.

S.J. (mother) and A.H. (father) appeal from the juvenile court's order terminating their parental rights to their son S.J. and daughter A.H., now nine and eight years old respectively. (Welf. & Inst. Code, § 366.26; all statutory references are to this code.) They contend the court erred by not applying the benefit exception under section 366.26, subdivision (c)(1)(B)(i). We disagree and affirm.

FACTS

The children were detained in May 2010 on allegations of general neglect and caretaker abuse, based in part on marijuana smoke filling the house and glass drug pipes within the children's reach. Parents had a history of methamphetamine use and the children reported seeing them smoke marijuana on that day and others, despite mother being six months pregnant. After sustaining an amended jurisdictional petition, the court removed the children from parents' custody in August and granted reunification services.

At the six-month review hearing, the court extended the reunification services. Parents had made minimal progress on their case plans and continued to test positive for marijuana. In June 2011, parents tested positive for marijuana and missed tests the next two months. They also tested positive for methamphetamine in July, which they claimed was due to cold medicine they had taken. The testing laboratory advised that was not possible. Mother again tested positive for marijuana in August.

But for the 12-month review hearing in September, Orange County Social Services Agency (SSA) reported parents passed all drug tests, missed no appointments, and were "in full compliance." Because parents had a child born after S.J. and A.H. were removed, they were entitled only to up to 12 months of reunification services, which they had already completed. Despite that and the prior recommendation to terminate services, SSA stated reunification might be possible within the next six months if parents remained as determined. The court continued the hearing.

Parents' progress continued into November when they began unsupervised four-hour visits twice a week. The court continued the permanency hearing a few times to allow parents to obtain housing with county assistance in light of their consistent progress in their recovery efforts. Once parents obtained appropriate housing, overnight visits would be allowed upon court approval. Although parents missed a few drug tests, they participated in their treatment programs and drug use was not suspected.

In March 2012, the court terminated reunification services and set a section 366.26 hearing, but authorized SSA to place the children with parents once housing was obtained. That month, parents received their housing voucher and located a home. But in April while waiting for it to be inspected and approved, mother tested positive for methamphetamine. The goal became to place the children with father, while mother lived apart pending six months of sobriety and progress in a substance abuse treatment program. Mother was later discharged from that program for noncompliance.

Parents now had supervised visits with the children twice a week for two hours. Although father was also eligible for unsupervised visits, he "didn't even think about it," and only went with mother to supervised ones claiming lack of transportation.

By July 2012, father had secured approved housing and continued complying with his recovery program while mother attended only two classes of a treatment program she had reenrolled in. The court continued the permanency hearing to October and authorized funds for father to obtain a drug testing patch. Upon obtaining the patch and testing clean for a few weeks, father would be entitled to start a 60-day trial visit. Father did not have the drug patch applied until September, first claiming work issues and later "reveal[ing] he [was] 'afraid' to have . . . the responsibility for caring and financially supporting [the children] by himself." His first drug patch analysis came back negative for all substances but the next month four drug patches tested positive for methamphetamine. Father denied drug use and claimed his Zantac medication caused the positive results. The laboratory's certifiers and director stated that was not possible.

In November, the children were placed with new foster parents interested in long term foster care or adoption. The court continued the permanency hearing to allow for a bonding study between parents and the children. By February 2013, the children had "settled into their foster home very well" and became "increasingly closer to the foster parents" each month, seeking hugs and calling them "mom" and "dad." The foster parents were now interested only in adoption because the other options did not guarantee permanency; if that was not possible, they asked that the children be removed.

Throughout the proceedings, parents visited and called the children regularly and consistently. Although the children continued visits with parents, and it was unclear what they understood about adoption given their age, they had "difficulty dealing with . . . parents' broken promise . . . [they would] be coming home with them soon." S.J. said "it feels good living" with the caretakers while A.H. stated living with them was "fun." They "expressed their desire to stay with [their current caretakers] if reunification is not possible, and [were] open to the idea of adoption."

The children told the same thing to the psychologist conducting the bonding study, Dr. Roberto Flores de Apodaca (Flores). According to Flores, the children had been upset when they expected to go home but did not. After that, A.H. no longer "expressed upset [sic] about reuniting with parents." The children did not always want to take parents' phone calls but sometimes did to not hurt their feelings. S.J. talked to his parents every day, enjoyed their visits, and hoped to go back to them but his foster parents were "very nice" to him and "he likes it where he is living," as it was "awesome." A.H. enjoyed visits with parents, really missed them, and was sad when they said goodbye, but "likes it where she is now" and did not "express a preference" where she wanted to live, stating that was "hard to say." She talked to parents daily, but sometimes "[did not] have much to say."

Flores found "little doubt that the children are deeply bonded with their biological parents" but also were "engaged, trusting and affectionate with" the foster

parents. He concluded that if parents were found to have been abusing drugs and lying, "it would be in the children's best interests to move on with their lives without the upheaval and insecurity bound to be caused by parents so lacking in integrity." But if Zantac could have caused a false positive result, "then it would be in the children's best interests to continue in a relationship with their parents." To Flores, it "seem[ed] incongruous with the progress [father] had been making to have relapsed at that time, with amphetamines" because father's drug of choice had been marijuana.

A month before the permanency hearing, mother was in danger of being discharged from her current substance abuse treatment program for not attending group sessions. Father had two positive drug patch tests, but denied he had relapsed and did not reenroll in any treatment program. Since the patch was applied, father had at least 11 positive and 11 negative tests. The children's therapist, who had initially hoped the children would be able to return to parents given their strong attachment, now believed permanency was "the most importan[t] thing for the children at this time" if not with parents then with the foster family, with whom the children have been "the most comfortable, and the most 'at home' [] . . . since they have been in protective placement."

At the May 2013 permanency hearing, father testified he and mother spoke to the children on the telephone every day that they did not visit, although the children recently stopped calling because of problems at school due to the calls. During visits, the children were affectionate, "br[oke] down" when they ended, and "would be devastated" if they stopped. When mother's visits were changed to monitored, father did not visit the children on his own because he had to work. He claimed the last time he used marijuana was in April 2010 and had not used methamphetamine since the children were born.

S.J. testified he did not ask why the phone calls with parents recently stopped and did not know how he felt about it. He wanted more visits because he "get[s] to see [parents]," they bring food that he likes, and they play together. He did not talk to them about his week. He would be sad if he was unable to visit with parents because

they were nice and made him feel happy, and "very, very sad" if he could no longer see them. He started calling his foster parents "mom" and "dad" on his own and wanted their home to be his "forever home" if returning to his "real mom and dad" was not possible.

A.H. testified she wanted more visits with her "real mom and dad" because she "really miss[]ed them," though there was nothing they did that made her miss them when they were not there. Nor did she know how she felt about the stopped phone calls. She would feel "really sad" if she was no longer able to visit parents but it did not bother her when they left after visits although she cried once when they had to leave early. If she could not live with parents, she would like the foster home to be her "forever home."

The court terminated parental rights, finding the children likely to be adopted and that parents had failed to establish the beneficial relationship exception given that "for the last three years, [they] have not occupied a 'parental' role" and had extremely limited visits, which although regular and consistent, were mostly supervised. Mother struggled with consistently participating in a treatment program and father lacked credibility in claiming "he had been sober for the last three years and . . . not . . . using illegal substances." Father's failures to attend the unsupervised visits or immediately obtain the drug patch to work toward a 60-day trial release, plus his fear of having sole responsibility for the children, "individually and together are not particularly parental and speak to the relatively low quality of the parental relationship."

DISCUSSION

Once a child is determined likely to be adopted, the court "shall terminate parental rights" (§ 366.26, subd. (c)(1)) and order the child placed for adoption unless the parents "show that termination of parental rights would be detrimental to the child under one of the exceptions listed" (*In re C.F.* (2011) 193 Cal.App.4th 549, 553). Parents argue

the exception under section 366.26, subdivision (c)(1)(B)(i) applies because they showed a beneficial relationship exists between them and the children. We disagree.

"Most courts have applied the substantial evidence standard" (*In re K.P.* (2012) 203 Cal.App.4th 614, 621 (*K.P.*)), while "at least one court has concluded that it is properly reviewed for abuse of discretion" (*ibid.*). A third approach "incorporates both . . . standards" (*ibid.*), reviewing for substantial evidence "whether a beneficial parental . . . relationship exists" (*id.* at p. 622), and for abuse of discretion "whether the existence of that relationship . . . constitutes 'a compelling reason for determining that termination would be detrimental to the child[]" (*ibid*). Under any of these approaches, the court properly rejected the parent-child exception.

A beneficial relationship is not, as father claims, one "strong enough to benefit the child and which would cause detriment if terminated," but rather "one that "promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." [Citation.] The existence of this relationship is determined by "[t]he age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs.'" (*In re Marcelo B.* (2012) 209 Cal.App.4th 635, 643.) Even if father is correct that "there is considerable evidence in the record which supports the opposite conclusion," we defer to the trial court, whose "role to assess the credibility of the various witnesses, to weigh the evidence to resolve the conflicts in the evidence. . . . [W]e must accept the evidence most favorable to the order as true and discard the unfavorable evidence as not having sufficient verity to be accepted by the trier of fact." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53.)

Parents rely on their reciprocated love and bond with the children, with father claiming the court abused its discretion by ignoring Flores's finding parents shared a "deep bond" with the children. But while the court may not have expressly referred to Flores's finding in this regard, that does not mean it did not consider it. The court noted

several times the children's "affection and love for . . . parents" and vice versa. Because the court did not "ignore" the bond between them, we are not persuaded by father that its discussion of *In re Amber M*. (2002) 103 Cal.App.4th 681 and *In re S.B.* (2008) 164 Cal.App.4th 289 demonstrates it "may not have fully understood the significance of the 'deep bond' the children shared with . . . parents." Those cases are also distinguishable in that in addition to the close bond with the children, in *In re Amber M*., the mother "was devoted to them and did virtually all that was asked of her to regain custody" (*In re Amber M*., at p. 690) and in *In re S.B.*, the father "complied with 'every aspect' of his case plan" (*In re S.B.*, at p. 298). The same cannot be said here.

Parents' inability to place their children's needs first supports the court's finding they did not occupy a parental role in their lives. "No matter how loving and frequent the contact, and notwithstanding the existence of an 'emotional bond' with the child, 'the parents must show that they occupy "a parental role" in the child's life.' [Citations.] The relationship that gives rise to this exception to the statutory preference for adoption 'characteristically aris[es] from day-to-day interaction, companionship and shared experiences. Day-to-day contact is not necessarily required, although it is typical in a parent-child relationship." (*K.P.*, *supra*, 203 Cal.App.4th at p. 621.)

Parents continued testing positive for marijuana for over a year after the children had been removed from their custody in May 2010 and at least once for methamphetamine in mid-July 2011. It was not until September 2011 that parents began complying with their reunification services. Although by November they had progressed to unsupervised four-hour visits twice a week, mother then tested positive for methamphetamine and was discharged several times from her treatment programs for failing to comply with the requirements. And while father could have obtained a 60-day trial visit by having a drug patch applied and testing clean for a few weeks, he waited over two months before applying the patch because he was "afraid" to have sole responsibility and then had over 11 positive drug patch results.

Father contends the court's finding of a nonparental relationship was "based almost exclusively on [his] 'numerous "dirty" drug patch results' and his 'untenable excuses as to why the drug patch results are positive for methamphetamine." Father asserts this was an abuse of discretion because the court did not acknowledge the parents' bond with the children, a claim we have already rejected, or Flores's comment that it seemed "incongruous" father would have used methamphetamine since his drug of choice was marijuana, which made Flores question whether father had relapsed. But it was not incongruous, as father had a history of methamphetamine use and tested positive for it in July 2011, over a year before the drug patch was applied in September 2012.

Father also misstates Flores's belief as being "that certain over-the-counter drugs were known to cause false positives for methamphetamine on drug tests." Flores recognized this was "beyond [his] realm of expertise and the scope of [his] role as a forensic psychology examiner[,] . . . [and] defer[red] accordingly" yet noted "a number of prescription and over-the-counter medications (e.g.[,] Sudafed, Tavis-D, etc.) have been known to be able to render a false positive exam on the drug-patch" and suggested a nonbiased expert opine on the issue. Flores did not actually say those drugs rendered false positives for methamphetamine, nor did father ever claim he took these drugs.

Father claimed it was his Zantac medication that caused the positive results. He told Flores he has been taking Zantac "years for his acid reflux." If so, and if Zantac caused false positives, his first drug patch test should have been positive, but it was not. Father also told Flores "he stopped taking medications after 3 weeks," and that his "levels dropped every week after that." Yet between September 2012 and April 2013, he had at least 11 positive and 11 negative tests. Father does not explain these discrepancies.

Father acknowledges that in November 2012, the court invited his attorney "to present evidence that Zantac could yield a false positive on a drug patch test . . . and that counsel apparently elected not [to] do so." His appellate counsel cites several Web sites to claim "the [I]nternet is replete with articles and other documentation attesting to

father's position." But no effort was made to have this evidence properly considered by this court. Regardless, it was not presented to the juvenile court and thus cannot be considered on appeal. (*In re M.S.* (2009) 174 Cal.App.4th 1241, 1251, fn. 4.)

Further, the court's conclusion there was no parental relationship was not "based almost exclusively on" his positive drug patch results and "untenable excuses," as father asserts. Rather, *in addition* to those issues, it noted father had the chance to have the children be released to his custody if he promptly had the drug patch applied. But he delayed two months, leading the court to infer he "did not get the free drug patch to start the trial release because he . . . was not ready to take the children." No inference is needed as father admitted he waited because he was "afraid" to be solely responsible.

The court was also bothered by father's failure to attend the unsupervised visits he was eligible for, which father acknowledged he "didn't even think about." Aside from five months of unsupervised four-hour visits twice a week from November 2011 to the following April when mother tested positive for methamphetamines, parents' interaction with the children consisted of two hours of supervised visits twice a week. Such limited supervised visits supports a finding they failed to establish they had "a parental, rather than caretaker or friendly visitor relationship with the child." (*In re Casey D., supra*, 70 Cal.App.4th at p. 51; see also *In re Jeremy S.* (2001) 89 Cal.App.4th 514, 523 [benefit exception showing "difficult to make . . . where . . . parents have . . . [not] advanced beyond supervised visitation'"], disapproved on other grounds in *In re Zeth S.* (2003) 31 Cal.4th 396, 413-414.) Thus, for over three years, parents lacked the "day-to-day interaction'" (*K.P., supra*, 203 Cal.App.4th at p. 621) during which they could tend to the children's physical care, nourishment, comfort, affection and stimulation. "One can know a child's interests, enjoy playtime together, and be a loved relative, but not occupy a parental role in the child's life." (*In re Jeremy S.*, at p. 523.)

Father analogizes this case to *In re Scott B*. (2010) 188 Cal.App.4th 452. There, an 11-year-old child who had spent nine of those years with his mother and

repeatedly said that he wanted to live with the mother, "did not want to be adopted," and if he were adopted, "he would run away." (*Id.* at pp. 462, 466.) A court-appointed special advocate also "opined that it is imperative that when Scott is adopted he maintain contact with Mother as it is clear that Mother and Scott are extremely close and it would be detrimental for their relationship to be disrupted." (*Id.* at p. 465.) But here at the time of the section 366.26 hearing, S.J. and A.H. were almost nine and eight years old respectively and had been out of parents' custody for over three years, more than a third of their lives. And unlike *In re Scott B.*, both children indicated they wanted to live with foster parents permanently if they could not return to parents.

Additionally, although Flores found the children deeply bonded with parents, he concluded that if parents were abusing drugs and lying, which the court found father was doing with regard to his positive drug patch results, the children's best interests would be to move on with their lives without them. Likewise, although the children's therapist had initially hoped the children would be able to return to parents, by the time of the permanency hearing she believed permanency was the most important thing for the children, if not with parents, then at least with the foster parents with whom they were "the most comfortable, and the most 'at home'[]" that she has seen them since they were first placed in foster care. Moreover, the children's counsel agreed "the benefits from a stable and permanent home provided by adoption outweighs the benefit from a continued relationship with the parents in this case." A minor's counsel's opposition to a finding the beneficial parental relationship applies is significant, although not determinative, given that counsel is charged with representing the child's interests. (§ 317, subd. (e)(1); *In re Kristen B.* (2008) 163 Cal.App.4th 1535, 1541.)

Mother attacks the foster parents for "reneg[ing] on their original commitment to long-term care as well as adoption," and stating they wanted the children removed from their home if adoption was not possible. But the court expressly stated it was not "giv[ing] any weight to [foster parents'] asserted intentions in its balancing as it

would be absurd to allow a caretaker to dictate whether adoption should be ordered or not." Even so, it noted their "intentions underscore the relative instability of legal guardianship or long-term foster care when compared to adoption." In this regard, "[t]he Legislature has thus determined that, where possible, adoption is the first choice. 'Adoption is the Legislature's first choice because it gives the child the best chance at [a full] emotional commitment from a responsible caretaker.' [Citation.] 'Guardianship, while a more stable placement than foster care, is not irrevocable and thus falls short of the secure and permanent future the Legislature had in mind for the dependent child.'" (*In re Celine R.* (2003) 31 Cal.4th 45, 53.)

Mother faults the court's reliance on *In re Marcelo B.*, *supra*, 209 Cal.App.4th 635 and *In re Cliffton B.* (2001) 81 Cal.App.4th 415, claiming they are distinguishable. County counsel agrees "the present case contains facts that are more favorable to the birth parents in certain respects than the facts in those cases." But the fact these two cases are distinguishable does not mean the court erred in its analysis. The benefit exception must be determined "on a case-by-case basis, taking into account the many variables which affect a parent/child bond." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) Parents have not shown this was not done.

We also reject mother's claim the court mischaracterized the children's "testimony as indicating a 'clear preference' to be adopted by the current foster parents." What the court actually said was that given its determination that returning the children to parents was not a viable option at that point, and the children's statements they wanted the foster parents to be their parents if they could not be returned to parents, "the children have expressed their clear preference to then be adopted by these caretakers."

Father maintains the court failed to consider the unknown impact on the children of its decision to permanently remove parents from their lives, claiming "there was simply no way to assess" it since they were never asked. He asserts there is no evidence "the children would not be irreparably harmed if they were never again to see

their parents." But neither is there evidence they would be. It was parents' burden "to prove that 'severing the natural parent-child relationship would deprive the child of a *substantial*, positive emotional attachment such that the child would be *greatly* harmed." (*In re Marcelo B., supra*, 209 Cal.App.4th at p. 643.) They have not carried that burden. Although both children testified they would be extremely sad if they could no longer see parents, Flores and the children's therapist believed it would be in the children's best interest to move on and find permanency under the facts found true here. "The reality is that childhood is brief; it does not wait while a parent rehabilitates himself or herself. The nurturing required must be given by someone, at the time the child needs it, not when the parent is ready to give it." (*In re Debra M.* (1987) 189 Cal.App.3d 1032, 1038.)

The court properly considered all of the facts before it, including the strong bond between parents and the children, and parents' failure to assume a parental role or resolve their substance abuse issues, and limited visitation. We affirm.

DISPOSITION

The order is affirmed.

RYLAARSDAM, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.